

LEVEL 4 ASSESSMENT SPECIFICATION

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Table of Contents

<u>PART (A)</u>	3
<u>Theory of Separation of Power:</u>	3
<u>References:</u>	7
<u>PART (B)</u>	8
<u>Material Facts:</u>	8
<u>Issues to be determined:</u>	8
<u>Rule:</u>	8
<u>Application:</u>	9
<u>Conclusion:</u>	11
<u>References:</u>	11
<u>Primary Sources</u>	11
<u>Case laws:</u>	12
<u>Legislation:</u>	12
<u>Secondary Sources</u>	12
<u>Web-articles</u>	12
<u>Web-articles:</u>	12

PART (A)

Theory of Separation of Power:

The principal institutions of the legal system of state are generally, Legislation, Executive and the Judiciary. It is expected that each of the powers shall be working on its own and that no one would be intervening with the other however, this is not the case in United Kingdom. The United Kingdom seem to have a grim reality when it comes to separation of powers in the legal system. We know that the United Kingdom lacks the written constitution, and this gives free hand to the institutes to overlap. Theory of separation of power is the theory that describes the ways through which state distributes its power between different branches. This Doctrine was firstly mentioned by Aristotle in Politics and then in 1660 by John Locke who believed the government shall not be handed over to a single person and that there shall be separation of power between the organs of state. According to him this theory was a simple idea that government power should not be concentrated into the hands of one person or one body, for fear that tyranny would be the result. Later, a French writer, Montesquieu (1748) believed that there would be an end to everything, if the same man, or the same body were to exercise those powers.¹ We can see that both identify this Doctrine as the principal that could result in tyranny. Montesquieu was willing to slide the overlap between the organs of the government (legislature, executive, Judgement). He was not specifically against the Doctrine because of the one body exercising the whole power. However, slightest overlap is acceptable according to Montesquieu. Each of them ensures check and balance and makes sure that they are acting within their limits or not.

“Power corrupts and absolute Power tends to corrupt absolutely”²

We should keep this in mind that this theory is a key theory which enables democracy. Within the label of democracy, there is little separation of powers exercised in the UK. In some countries such as the United States and India, there is a complete separation whereas in the UK, the organs overlap with each other a lot. We will closely discuss the examples of how each organ overlaps with the other in the upcoming paragraphs.

¹ The Spirit of Laws by Montesquieu ,1748

² International Journal of Law Management & Humanities, 2020

Under the theory of separation of powers, UK politics is filled with numerous examples which indicates this overlap. In UK legislation, which consists of the Monarch, House of Lords and House of Commons, that runs the legislature gives the executive powers to run the country. The Executive, which consists of The Crown and the Prime Minister and his Cabinet, may amend the legislation that they need to amend. In legislation, the monarch has only nominal powers who listens to the advice of the Prime Minister who in return follows the MPs. The fact that government Ministers can also act as individuals, MPs risks a lot of independence by Parliament. This is the first evidence for how there is an overlap between two organs. It is fact that Government Ministers also act as MPs. So, if they want to retain the post as Minister, hundred out of approximately 650 MPs are expected to vote with the government. What happens then is many of the remaining MPs in political party feels strong pressure vote with the government. So, there is an automatic bias in number of Government Ministers to act by one third in the article. It is preferring to the idea of the payroll where ministerial appointments are more than effectiveness of the government they will also be used as a mean to exercise the political control. Increasing the number of Ministers, increases the Prime Minister's powers, and inflate the government payroll in her support. That payroll vote is the number of voters of the parliament useful to government job therefore expected to vote to the government or resign.³ This obviously is not fair. It clearly demonstrates the overlap between the legislature and the executive. This really is bias that size of this payroll vote does affect the government.

The second example is how the legislature and the judiciary overlaps. Visible overlap can be seen between the two institutes as judicial appointments are made either by the Queen on the recommendation of Lord Chancellor or in the case of lay magistrate and certain other junior judges by Lord Chancellor directly.⁴ Lord Chancellor was once part of all the three organs of the state which is an exception to this doctrine. In the past, the Judges of the Supreme Court could sit in the House of Lords, but The Constitution Reform Act, prohibits this. However, **The Constitution Reform Act, 2005** is the key piece of legislation which was introduced in Supreme Court. It strengthens the doctrine practically and refused the abuse of powers in the state. Many claims that it has made a clear Separation of powers between the Judiciary and legislation. It says that judges of the Supreme Court do not have the right to sit in the House of Lords like they did in the past and historical judges are very much distant than the Doctrine of Separation of Powers meaning that they should question the validity of an active parliament.

³ https://www.lexico.com/definition/payroll_vote

⁴ Law Essay, 2019

The European Communities Act, 1972, the relevance of which is not much questionable. This act gives legal authority to EU law over the national / Domestic laws. According to this Act the judges are required to refer judgements to ECJ. All primary legislation enacted by the UK parliament after the Act came into force on 1 January 1973 has effect subject to the requirements of EU law. This means that the courts are obliged to strike down legislation which is inconsistent with EU law. It judges to give precedents of EU Law over Domestic Laws. So, it means is that a law which came from a European Court of Justice conflicted with a Law within the United Kingdom. And **The Human Rights Act, 1998**, gives Judges a power to declare some domestic legislation to be a very unspecific requirement of a European Connection on Human Rights but what is important is that the legislation remain valid until it is changed by parliament.

Tony Nicklinson V Ministry of Justice; AMV DPP and others. Tony Nicklinson, age 58, man from Melksham, Wiltshire, is a man paralyzed from the Neck and he contacted to the medical team that they would kill him without being questioned by law. He said his life is pathetic since 2005 when he had this stroke that left him helpless. The Court declared the act is illegal and turned down the request. He said that the Court decision debated him and that he will file an appeal against the decision, explaining his grief he said that: "I am saddened that the law wants to condemn me to a life of increasing indignity and misery". However, the Local Justice Toulson believed if the decision was made according to the will of Mr. Tony then there would have been a change in law which obviously is not the job of the judiciary. This can be seen in numerous other cases where parties regarding this policy where the judiciary has very showed itself to be reluctant to appear before the powers and functions of parliament. They consider it to be a policy area where judiciary do not consider itself to be there. Judiciary should be given at least the powers related to its organ which can be seen restricted by the other organs of the legal system

Lastly, the Executive and Judiciary never fails a chance to overlap. Section#3 of the Constitution Reform Act, 2005 the Lord chancellor who is also the secretary of state for justice is required together with other government ministers, to preserve the continued independence of the judiciary. The judiciary is not tolerated exerting its due rights. So that's what a state is according to statute. However, in February, 2013 Theresa May who was Home Secretary was criticized frequently with the Doctrine of this Separation of Powers when she stated that: "**it's my job to deposit foreigners who commit serious crime-and I'll fight any judge who stands in my way**". Hence, Lord chancellor and the Minister do not stick to particular judicial

decisions. They are competing with the organs to get their rule over the other. The UK is at one side trying to implement the Doctrine and on the other hand is failing badly to make it up.

Separation of powers is neither a constitutional irrelevance, nor a freestanding and judicially enforceable constitutional doctrine, yet it remains an important tool in the explanation and assessment of constitutional power in the United Kingdom⁵. We have studied in detail the implication of the Doctrine of Separation of Powers in the UK Constitution and we know that there is a strong need to change the systematic division of authorities. Every state can perform well when they are provided with all the powers to do the right thing however, if one system will collapse with the other and will keep on intervening the other organ then it will lead to the destruction of the state. It largely affects the justice between the organs, and this leads to poor governance. The UK is much confused between monarchy and Parliament and there is a strong need to put a limit as if compared to the authorities of the specific organ for the countries like USA and India, they are running towards success through their strong democracy. We have seen few cases where the overlap of one organ with the other has resulted in the problem for the other organ and this, to be honest, is the main reason towards the collapse of justice and it affects the common man a lot. We really need to resolve this big loophole in our system which since centuries has been disturbing the powers of the pillars of the legal system of UK. Good news is that this Doctrine is now seen as a gateway between the rigid and the most flexible interpretations of the Separation of Powers and the recent Constitution Reforms should also clearly consider the need to implement the Doctrine with its full energy.

The title of the paper published by the author, Chenoy Ceil perfectly describes the UK and its stand about the Doctrine:

The Concept of Separation of Powers is not well-respected in the UK Constitution.⁶

⁵ <https://dro.dur.ac.uk/21268/1/21268.pdf>

⁶ Ceil, 2018

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Law Essay, 2019

The Spirit of Laws by Montesquieu ,1748

International Journal of Law Management & Humanities, 2020

PART (B)

Material Facts:

Menna is a resident of Mold situated in North Wales where the government is planning to build a new super-prison. She has an objection to that proposal for which she decided to protest it through a march along with forty others approximately. For this purpose, she informed the local police station and has given notice of the route intended ending at the proposed site of the prison, currently a car parking of a local shop also stating the time of march as well which is 3 PM on Saturday because it's the closing time of the market so will cause less disruption. The shop owner objected to the march claiming that there is a closing sale on the same day of march so the march will affect it by disrupting the customers hence should not be allowed. Along with the shop owner, the Chief Constable also had some serious concerns of traffic issues due to the march and will also disturb visitors of the shop.

Furthermore, supposing that the march held lawfully but during that a protestor named Tim called PC Hemp a 'pig' and PC Hemp for that abusive language told him that he had been arrested under s.4 Public Order Act (1986) for using abusive language.

Issues to be determined:

1. Right of free assembly and protest to Menna as a citizen.
2. Does the Chief Constable have any powers to control or prohibit the intended march?
3. What is the legality of PC Hemp's actions of arresting Tim?

Rule:

The right to protest is one of the initial rights of an individual especially when it comes to a democratic and liberal society where it is considered vital. The laws and rules provided by the legislature in regard to a protest march is:

- As provided in Article 10 and Article 11 of the European Convention of Human Rights (ECHR) which The United Kingdom is a signatory.
- Moreover, the Human Rights Act 1998, an extension of the same ECHR also in its article 10 and 11 entitled every citizen of the United Kingdom freedom of expression and freedom of assembly and association.
- Public Order Act 1986 in its section 11; provides the procedure of notification to the police in case of a protest march.
- Whereas Section 12 and 14 of the same Act allows a police officer to apply sanctions and conditions on individuals taking part in the protest if there are any kind of serious threats of disorder due to that protest.
- Although every individual is entitled to have a right of free expression under Article 10 ECHR this right is limited to the scope where it infringes the right of others to be abusive.
- The Public Order Act 1986 especially enacted to abolish the offenses of common law like a riot, rout, unlawful assembly and affray and certain statutory offenses relating to public order in its *Section 4A* clearly states that “it is an offense” if a person uses abusive or insulting words or behavior, or disorderly behavior which puts another person into the feeling of harassment, alarm or distress.
- The Police and Criminal Evidence Act 1984 section 24 power of arrest is given to a constable if he suspects someone of any offense or there are chances that he would have done any offense.

Application:

The first issue is regarding the freedom of expression. When it comes to freedom of expression every individual is entitled to hold opinions and express these opinions and ideas to society or their social circle.⁷ This expression can be in any form i.e., it can be in verbal form or as well as in the written form. Article 10 of the European Convention for Human Rights entitle these rights without any discrimination. But the question arises to what extent one is entitled to these rights and is the governmental authorities have the right to stop them. Whereas the injunctions are concerned government and public authorities cannot stop someone if he or she has already published his or her views even if the injunction is lawful.⁸ But when injunction or ban to be put on a person or group of persons the state authorities must have justified it with strong

⁷ Equality and Human Rights Commission, “Human Rights: Human Lives”, May, 2014.

⁸ *The Observer and the Guardian v. United Kingdom* European Court of Human Rights 1998, 14 E.H.R.R. 153.

reasonable concerns and the discretion they have, must be exercised reasonably, carefully, or in good faith.⁹ But this right of freedom is not unlimited it has its scope and limitation like every freedom has as Justice Oliver Wendell Holmes said, “Your freedom ends where my nose begins”.¹⁰ For instance, someone alleges a thing on a person which is defamatory, the plea of freedom of expression cannot be taken if these statements do not prove to be true and the person making them will be held accountable.¹¹

But moreover, the right of freedom of expression of an individual has given more strength by Article 11 of the Convention, which gives the right of peaceful assembly to individuals to share their thought and airing their protest and differences in a peaceful manner. And if someone violates this right of others for example even a governmental authority arrest people based on lawful assembly or bar them from doing so it will be a violation of their right under Article 11 of the Convention.¹²

The second main issue is regarding the police powers that how much powers the police have to stop a protest and bar citizen from protest march under the British law. The police are entitled to certain powers but these powers cannot be used except there are serious concerns otherwise the police cannot obstruct the protest assembly on public land even if it is a highway, which is not a public or private nuisance and does not unreasonably obstruct the public’s rights is lawful whether under A10/A11 or common law. But if there is a protest march that had been notified under section 11 of the Public Order Act and Chief Constable tries to bar that because of powers given to him under The Police and Criminal Evidence Act 1984, they can be challenged in court.¹³

The third fact in issue raised was on the powers of police to arrest a person. Whether police can arrest a protestor or not? The answer is yes, police can arrest a person with or without warrants.¹⁴ But this arrest will not be legal or lawful unless the grounds of arrest have been informed to the person arrested.¹⁵ But it is established by the law that if a person uses abused or any kind of language or words which are offensive in nature it constitutes an offense.¹⁶ And

⁹ CASE OF KĄCKI v. POLAND,(Application no. 10947/11).

¹⁰ US National Library of Medicines, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1763331/>, Last accessed June 20, 2021.

¹¹ CASE OF OLAFSSON v. ICELAND,(Application no. 58493/13).

¹² CASE OF YELISEYEV v. RUSSIA,(Application no. 32151/09).

¹³ Metropolitan Police Commissioner, ex parte Blackburn [1968], 1 A11 E.R . 763.

¹⁴ S66 PACE 1984, Code G.

¹⁵ Cumberbatch vs The Crown Prosecution Service [2009] EWHC 3353 (Admin).

¹⁶ The Director of Public Prosecutions vs Jane Distill [2017] WRL(D) 619.

as given under The Police and Criminal Evidence Act 1984, it is one of the powers of police officers that he can arrest a person with whom he is of suspicion that he will commit an offense or the offense have been committed by him.¹⁷ But for sure he has to justify the arrest and must have informed the arrested person about the grounds of his arrest.

Conclusion:

The freedom of expression and assembly is a matter of right to every individual, although this right can be barred or suspended when there is a matter of national security and where one person's right of freedom infringes the right of another person and regarding other serious concerns. These reasons then also allow the police and the government to use their powers as a matter of public administration. These powers and restrictions must be exercised as given under the Public Order Act 1986, The Police and Criminal Evidence Act 1984, The Police and Justice Act 2006, and other Laws provided by the Legislature. But these powers and their ambient shall not cross the limitations and scope of one's right of freedom and other human rights.

References:

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¹⁷ Section 24, The Police and Criminal Evidence Act 1984.

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